STATE OF MICHIGAN

COURT OF APPEALS

BILL WARGO,

Plaintiff-Appellant,

v

MOHAMMAD GHAFFARLOO, M.D., MARVIN FRANCIS JUNGELS, and MOHAMMAD GHAFFARLOO, M.D., P.C.,

Defendants-Appellants.

UNPUBLISHED
January 30, 2014

No. 312331
Macomb Circuit Court
LC No. 2011-005456-NI

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendants' motions for summary disposition brought under MCR 2.116(C)(8) and (10). We affirm the order to the extent it granted defendants Mohammad Ghaffarloo, M.D., and Mohammad Ghaffarloo, M.D., P.C.'s, motion for summary disposition, reverse the order to the extent it granted defendant Marvin Jungels's motion, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

Plaintiff was riding his motorcycle down Harper Avenue in St. Clair Shores, a five lane road with a 35 mile per hour speed limit. Plaintiff entered the center turn lane and saw a car bearing down at him at an excessive speed, but he could not see anyone behind the wheel. Denise McCloskey was driving behind plaintiff's motorcycle when a PT Cruiser drove into the center lane and then suddenly into her lane, hitting a Hummer, the motorcycle, and her vehicle. Defendant Jungels was the driver of the PT Cruiser, and he was driving home after an appointment with one of his physicians and after having thereafter stopped at an ice cream store that was only a half mile from his home. According to Jungels, the vision in his one functional eye became blurred as he pulled into the ice cream store. After purchasing ice cream for him and his wife, it is undisputed Jungels got back in the car and drove away – though he does not remember anything until the collision.

After engaging in discovery in both federal and state court,[1] all three defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court granted all three defendants summary disposition, but did not clarify under which subsection, MCR 2.116(C)(8) or (10). The court found that "[t]he undisputed medical records of Defendant Jungels establish that he most likely sustained a myocardial infarction at the time of the crash; his resulting unconsciousness precluding control of his vehicle caused Plaintiff's injuries," and thus, the sudden emergency doctrine applied and barred relief against Jungels. In that regard, the court concluded that the cardiac issue that "most likely" caused him to momentarily black out was an unusual circumstance, and Jungels had no reason to think it would happen because his pacemaker was functioning well and there was no evidence of adverse symptoms other than his testimony that his vision was blurring as he pulled into the ice cream store parking lot.

The court found no evidence that Ghaffarloo knew or should have suspected that Jungels might experience a myocardial infarction at any time, as all objective tests were negative. The court opined that Jungels's medical issues should not have prevented him from driving and that Ghaffarloo did not owe a duty to plaintiff as a third-party victim.

II. ANALYSIS

This Court reviews de novo a decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). From a review of the record it appears both motions were granted under MCR 2.116(C)(10). A court may grant summary disposition under MCR 2.116(C)(10) when there is no genuine issue regarding any material fact. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the light most favorable to the nonmoving party. *Id.*[2]

A. DEFENDANT JUNGELS

The doctrine of sudden emergency is an extension of the reasonably prudent person rule; therefore, the issue is whether the defendant acted as a reasonably prudent person would under all the circumstances. *Baker v Alt*, 374 Mich 492, 496; 132 NW2d 614 (1965). The sudden emergency cannot be of the defendant's making and must be unusual or unsuspected. *Vander*

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[1] Plaintiff initially filed a complaint against Jungels in Macomb circuit court that was removed to federal district court. After discovery, the federal case was dismissed and Jungels was added as a defendant to a new case that had been filed in circuit court against the Ghaffarloo defendants.

[2] Defendant Jungels argues that this Court should review the trial court's factual findings for clear error, but that is the standard of review for findings of fact made after a *bench trial*. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). In deciding summary disposition motions under MCR 2.116(C)(10), the trial court cannot make factual findings or determine credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009).

Laan v Miedema, 385 Mich 226, 231-232; 188 NW2d 564 (1971). A sudden blackout, or "syncope" episode, could constitute a sufficient emergency; however, it must be totally unexpected. *White v Taylor Distributing Co, Inc*, 482 Mich 136, 138, 140; 753 NW2d 591 (2008). Inconsistencies in the defendant's statements and medical documentation regarding his likely symptoms before the blackout can create a genuine issue of material fact regarding whether the blackout was unexpected and whether driving home in that condition was reasonably prudent. *Id.* at 142-143.

This case is quite similar to what the Supreme Court addressed in *White*. In *White* the defendant truck driver stopped at a rest area because of a severe case of diarrhea. *White*, 482 Mich at 137-138. After feeling better, the defendant recommenced driving until approximately 30 minutes later, when he exited the highway and began to feel dizzy and to sweat. *Id*. at 138. As the truck continued up the ramp, the defendant started to apply the brakes when he passed out, and hit a stationary vehicle. *Id*. As in our case, the defendant had no recollection as to what occurred immediately before the collision. *Id*.

The *White* Court held that there were genuine issues of material fact precluding summary disposition on sudden emergency grounds, holding that the evidence showed that the defendant knew or should have known not to continue driving after his illness at the rest area:

> Defendant asserts that he experienced a sudden emergency when he became dizzy and blacked out on the exit ramp seconds before he collided with plaintiff's vehicle; thus, the statutory presumption should not apply. We agree that a sudden, unexpected blackout could present a sudden emergency sufficient to rebut the statutory presumption. But a sudden emergency sufficient to remove the statutory presumption must be "totally unexpected." [*Vander Laan*, 385 Mich at 232]. *There is evidence that defendant may have known or should have known that he was not feeling well when he continued driving after his urgent stop at the Canton rest area. This creates a genuine issue of material fact regarding whether defendant's emergency was totally unexpected.* [*Id*. at 140 (footnotes omitted, emphasis added).]

Thus, in *White* the question of material fact arose as to the suddenness of the illness because the defendant had felt sick a half hour or so prior to his passing out. See, also, *id*. at 141 ("If defendant experienced ongoing symptoms or felt ill after his first onset of urgent illness at the rest stop, then any subsequent emergency was not totally unexpected and, thus, not sudden.").

Finally, the *White* Court also rejected the defendant's argument that because the emergency room physician testified that the defendant's syncopal episode occurred within seconds to a minute or so before he passed out, the defendant was faced with a sudden emergency. The Court thought otherwise:

> The ER physician also testified regarding how quickly defendant's syncopal episode may have developed: "In my opinion, I would say that happened over, you know, several seconds, a couple of minutes, that's pretty sudden." If defendant felt dizzy "a couple of minutes" before blacking out, then perhaps his subsequent emergency was not clearly sudden under the circumstances. Further,

> for the sudden emergency doctrine to apply, the emergency must not be of defendant's own making. [*Vander Laan*, 385 Mich at 231]. If defendant was aware that he was not feeling well when he left the rest area but continued driving anyway because he "did not have far to go," or if defendant felt ill while driving from the rest area to the Novi Road exit, or if defendant felt ill even a few minutes before he collided with plaintiff, then the emergency may well have been of his own making. [*Id*. at 142.]

As we read *White*, the focus is not exclusively on what caused the purported sudden emergency, i.e., whether in this case it was defendant's heart or eyesight, as much as it is whether something occurred before the accident that would cause a reasonable person to be concerned about their condition to drive. See *White*, 482 Mich at 141. And on that issue, plaintiff submitted sufficient evidence to create a genuine issue of material fact. Much like the defendant in *White*, Jungels experienced an illness or ailment prior to the accident when his vision became blurry when entering the ice cream store parking lot. Despite the blurred vision in his one functioning eye, Jungels chose to drive home because, like the defendant in *White*, he was "just about a half mile from home. I was wanting [sic] to get home." And, again as in *White*, evidence suggested that, contrary to Jungels's deposition testimony, he had previously experienced blurred vision. See *id.* at 138-143. Further, there was conflicting evidence regarding the potential causes of the syncope episode, and the fact that Jungels had not previously passed out is not dispositive, as neither had the defendant in *White*.

In sum, we conclude that the trial court interfered with the jury's role to judge credibility, weigh all the evidence, and resolve factual issues. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Viewing all the evidence in the light most favorable to plaintiff, as required under MCR 2.116(C)(10), *Ritchie-Gamester*, 461 Mich at 76, there were genuine issues of material fact regarding whether defendant's unconsciousness was a sudden, unexpected emergency, and whether he was, instead, negligent in driving. See *White*, 482 Mich at 138-143. Therefore, the trial court erred in granting defendant Jungels's motion for summary disposition.

B. GHAFFARLOO DEFENDANTS

Under both ordinary negligence and medical malpractice, a plaintiff must establish that the defendant owed him a duty. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660-661; 822 NW2d 190 (2012); *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). Whether a defendant owed a duty to the plaintiff is a question of law. *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004). Policy considerations relevant to this determination include the foreseeability of the harm, the degree of certainty that injury would occur, the connection between the conduct and the injury, moral blame, the desire to prevent future harm, and the burden of imposing a duty. *Colangelo v Tau Kappa Epsilon Fraternity*, 205 Mich App 129, 133; 517 NW2d 289 (1994). "Generally, a party has no duty to protect another who is endangered by a third person . . . ." *Shepard v Redford Community Hosp*, 151 Mich App 242, 245; 390 NW2d 239 (1986).

The duty of care in a medical malpractice claim arises from the relationship between the physician and patient. See, e.g., *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). We have previously held that a physician owes a duty of care to third

parties under narrow circumstances, in which the patient is considered a "dangerous person," under ordinary negligence or medical malpractice theories. See *Shepard*, 151 Mich App at 245-246; *Welke v Kuzilla*, 144 Mich App 245, 248, 253-254; 375 NW2d 403 (1985); *Duvall v Goldin*, 139 Mich App 342, 350-351; 362 NW2d 275 (1984). Although these opinions were issued before November 1, 1990, and therefore are not binding precedent, MCR 7.215(J)(1), they also have no precedential value under stare decisis because the facts in each of those cases are materially different than what is present in this case, and the decisions were expressly narrowly tailored to their facts.

In particular, *Welke*, *Duvall*, and *Shepard* all involved patients who were unusually dangerous: a person with epilepsy, which is commonly recognized as a dangerous condition for driving; a person the physician injected with an unknown substance and loaned his car; and a person with highly infectious spinal meningitis. Here, however, the medical documents indicate that Jungels only complained of transient blurriness in his eye; there was no evidence that he was completely blind before or after the accident. Further, plaintiff is not claiming that the vision specialist violated a duty, but rather Jungels's primary care physician, nor was there any evidence that blindness caused the accident. Quite simply, an elderly man with these medical symptoms did not constitute a "dangerous person" under *Welke*, *Duvall*, or *Shepard*, and to hold the Ghaffarloo defendants liable would improperly make physicians "highway accident insurers." See, also, *Singleton v U.S. Dep't of Veteran Affairs*, __ F Supp 3d ___ (ED Mich, Docket No. 12-14776, issued August 15, 2013), slip op at 3 n 2.

Current public policy also weighs against imposing a duty on medical professionals to take actions to protect third parties from injury, including when a patient may be considered an unsafe driver for physical or mental reasons. See MCL 333.5139 and MCL 330.1946. In those statutory provisions the Legislature made clear the policy choice not to make physicians liable for injuries to third parties caused by patients/motorists when the physician chooses not to warn of any potential dangers. Though MCL 333.5139 was not enacted until after the lawsuit was filed, it is clear evidence as to current Michigan public policy on this issue from the policy making branch of government.

The trial court did not err when it held as a matter of law that defendant physician and his professional corporation did not have a duty to take actions to protect plaintiff. Plaintiff argues that summary disposition was premature because discovery was not complete, but plaintiff did not request further discovery before the trial court resolved the summary disposition motions, and further discovery would not have provided support for plaintiff's position on this issue of law. See *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion regarding defendant Marvin Jungels. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra